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Repressed and Recovered Memories of Child Sexual Abuse: The Accused as “Direct Victim”

by
ROLA J. YAMINI*

Introduction

Mental health practitioners are feeling the heat from one of the field's most controversial issues of the 1990s: repressed and recovered memories of child sexual abuse.¹

Until the 1970s the reality of child sexual abuse was largely ignored.² During the 1980s, however, the magnitude of child sexual abuse in this country became apparent.³ Talk shows were deluged with stories of incest and molestation, and well known celebrities came forward with their stories of abuse.⁴ As we recognized the pervasiveness of child sexual abuse, a new class of people came forward with stories of their own.

Adults, primarily women between their twenties and forties, began coming forward to reveal memories of child sexual abuse.⁵ These adults had not deliberately concealed these incidents, but rather had only recently discovered them. Such memories, according to both victims and therapists alike, had been locked away, unbeknownst to them, only to resurface decades later.⁶

The validity of these repressed and recovered memories of child sexual abuse has generated a heated debate. Many therapists believe

* J.D. Candidate, 1996; B.A. 1993, Loyola Marymount University. To my father and brother, thank you for the years of unconditional love and support. I dedicate this Note to my mother, Fifi Yamini, 1935-1983.

1. See Bonnie Gangelhoff, *A Mental Health Dilemma: Searching for Truths in "Memories,"* HOUSTON POST, June 12, 1994, at E1; see also James H. Andrews, *Dredging the Past: Recovered Memory or False Memory?*, CHRISTIAN SCI. MONITOR, July 25, 1994, at 13.

2. Minouche Kandel & Eric Kandel, *Flights of Memory*, DISCOVER, May 1994, at 32.

3. *Id.*

4. Gangelhoff, *supra* note 1, at E1. Roseanne Barr and Oprah Winfrey are examples of celebrities who disclosed that they were victims of child sexual abuse. *Id.*

5. Mayo Clinic Health Letter, *Incompetent Therapist May Trigger False Memories*, NEWS TRIB. (Tacoma), July 5, 1994, at D6.

6. Kandel & Kandel, *supra* note 2, at 32.

that victims repress memories of abuse because they are unable to cope with the traumatic events when they occur.⁷ Other experts question the validity of repressed memory theory⁸ and refer to the outpouring of memories as the "false memory syndrome."⁹

Another heated debate has developed from the repressed-memory issue. This one centers around a different "victim"—the accused abuser. Across the country, suits are being filed by accused abusers and families of alleged abuse victims.¹⁰ The parties bringing these suits generally claim that mental health practitioners¹¹ negligently planted or "retrieved" memories that are false and have caused the complainants to suffer serious emotional distress.¹² The major hurdle the complainants must overcome is establishing standing to sue the therapists.¹³ The third parties argue that they are direct victims of the therapists' negligence and therefore have standing to sue. A few such claims have been successful.¹⁴ The success of these cases sent shockwaves through the mental health profession, which maintains that therapists owe no duty of care to third parties.¹⁵ Therapists argue that allowing third-party claimants to recover for emotional distress perpetuates the victimization of the abuse survivors.¹⁶ With potential liability to third parties lurking in the background, the concern is that

7. Andrews, *supra* note 1, at 13. Although some question the validity of repressed memory theory, most mental health professionals accept that memory can be repressed and recovered later. *Id.* They question, however, the techniques used by some therapists to recover the memories. *Id.*; see *infra* subpart I.C.

8. See *infra* section I.B.2.

9. See *id.*

10. This Note will assume the accused is a family member of the patient. This assumption is based on statistical findings that the accused is generally the father or close relative of the patient. See David McCord, *Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. & CRIMINOLOGY 1, 4-5 (1986). Likewise, this Note will discuss the accused family member's attempt to establish "direct victim" status because an accused family member is seemingly more directly affected than other family members by the allegedly tortious actions of the therapist, and would presumably have a stronger argument for "direct victim" status. Doctrinally, however, a cause of action for negligent infliction of emotional distress as a "direct victim" may be viable for a family member who has not been accused of abuse.

11. Mental health practitioners will hereinafter be referred to as "therapists." The term "therapist" will be used to refer to all mental health professionals working as clinicians or counselors: psychologists, psychiatrists, psychoanalysts, marriage-family counselors, hypnotherapists, and other therapists.

12. Mark Sauer, *Memory Verdict Sends a Message*, SAN DIEGO UNION-TRIB., May 15, 1994, at A3.

13. See Mike McKee, *Erasing the Memory of "Molien,"* THE RECORDER (S.F.), June 1, 1994, at 1.

14. See *infra* notes 160-62 and accompanying text.

15. Sauer, *supra* note 12, at A3.

16. See Gangelhoff, *supra* note 1, at E1 (discussing the fear that the debate over repressed memories will silence people who need help); Mark Sauer, *supra* note 12, at A3

therapists will be afraid to pursue thoroughly their patients' issues and that the patients therefore will continue to suffer.

This Note addresses generally the problems related to repressed and recovered memories. In particular, it considers whether the accused should be considered a direct victim of therapists' negligence and allowed a cause of action for negligent infliction of emotional distress ("NIED") under California law. It will attempt to trace the development of direct victim jurisprudence from its inception in the California Supreme Court case of *Molien v. Kaiser Foundation Hospitals*.¹⁷

This Note considers foreseeability of injury, degree of therapists' culpability, and policy considerations in proposing that NIED claims by accused third-parties against therapists be rejected. Instead, this Note proposes using intentional infliction of emotional distress ("IIED") to redress third parties' injuries caused by therapists who have acted with the requisite degree of outrageous conduct to warrant liability.

Part I discusses the unique issue of repressed and recovered memories. It addresses the debate surrounding the validity of repressed and recovered memories. Part I also examines various therapy techniques used in repressed memory cases and advises that use of some of these techniques may provide a basis for imposing liability on therapists.

Part II analyzes the relationship between the mental health profession and the legal profession. It traces the evolution of the mental health profession's legal privileges and duties, and compares the underlying policies with the policy allowing an accused abuser to bring emotional distress claims against therapists.

Part III looks at the other "victims"—the accused abusers—and their rights against therapists. It traces the history of direct victim status and analyzes whether accused abusers are properly considered direct victims of therapists' negligence.

Finally, Part IV offers a proposal that allows for some claims by third parties but that protects therapists from potential liability for unintentional, nonexorbitant conduct.

I. Modern Problem: Repressed and Recovered Memories

A. Introduction to Repressed and Recovered Memories

In a typical repressed-recovered memory case, such as those inundating therapy rooms, courthouses and the media, an adult woman

(discussing therapists' fears that third-party victories over therapists "will hamstring therapists' attempts to help their clients heal").

17. 616 P.2d 813 (Cal. 1980).

seeking therapy for unrelated issues begins to remember abuses that occurred decades before.¹⁸

The premise of repressed memory is that an event occurs which is so traumatic that, in a desperate effort to cope, one's mind dissociates itself and shuts the memory out.¹⁹ When this survival mechanism is no longer needed, generally when the victim is an adult and no longer subject to the abuse, the memories resurface, either gradually or in sudden flashes.²⁰

The urgent need to find out more about the accuracy of repressed-recovered memories is compounded when we consider the prevalence of child sexual abuse. Statistics show a disturbing frequency of sexual abuse. It has been conservatively estimated that eight percent of girls and three percent of boys in the United States are sexually abused.²¹ Some studies show numbers closer to twenty-eight percent of girls and nine percent of boys.²² Because reports of child sexual abuse were uncommon until the 1980s²³, thousands of adult victims of forgotten abuse may exist.

Repressed and recovered memories were brought to the forefront of the public's consciousness in the 1990 Franklin case.²⁴ George Franklin was tried and convicted for the 1969 rape and murder of an eight-year-old neighborhood girl.²⁵ The key evidence was his daughter's recovered mental images of the crime she claimed to have witnessed twenty years before.²⁶ Although the Franklin case did not involve recovered memories of child sexual abuse, it was the watershed event that set off a "surge in recovered memory lawsuits, [followed by] a backlash from accused parents."²⁷ Society is now left with conflicting research and a heated debate on recovered memories. The debate centers on whether such memories can be repressed, and if so, how to distinguish between genuine and false memories.

18. Mayo Clinic Health Letter, *supra* note 5.

19. Kandel & Kandel, *supra* note 2, at 34.

20. *Id.*

21. McCord, *supra* note 10. Statistics for the United States in 1986 estimated that 12% to 22% of all girls and 5% to 6% of all boys are sexually abused. Even using the most conservative statistics, this would mean 210,000 new cases of child sexual abuse a year. *Id.* at 3-4.

22. *Id.*

23. Kandel & Kandel, *supra* note 2, at 32.

24. Tom Philp, *Repressed Memory Case May Reopen*, SACRAMENTO BEE, Dec. 30, 1994, at A1 (discussing possible reopening of Franklin case, in which issue is admissibility of certain evidence not related to repressed memories of defendant's daughter); see *Franklin v. Duncan*, 884 F. Supp. 1435, 1448-56 (N.D. Cal.) (granting petitioner Franklin's writ of habeas corpus based on constitutional violations not related to repressed memories of petitioner's daughter), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

25. Philp, *supra* note 24, at A1.

26. *Id.*

27. *Id.*

B. The Debate

(1) *Supporters of Repressed-Recovered Memory Theory*

Supporters claim that repression of memories of child sexual abuse is extremely common²⁸ and that many though not all victims repress memories of abuse.²⁹ Approximately two-thirds of all incest victims report partial or complete memory repression of the sexual abuse.³⁰

The theory behind repressed memories is that traumatic experiences "can be so overwhelming that they cannot be integrated into existing mental frameworks, and instead, are dissociated, later to return intrusively as fragmented sensory or motoric experiences."³¹ Renee Fredrickson, a psychologist and supporter of the repressed-recovered memory theory, defines trauma as "any shock, wound, or bodily injury that may be either remembered or repressed, depending on [the victim's] needs, . . . age, and the nature of the trauma."³² She explains that because "memory repression thrives in shame, secrecy, and shock," repressed memories are likely to be about sexual abuse.³³ The memories surface, she continues, when the individual is "strong enough to face [them]."³⁴ Fredrickson explains that the recent explosion in recovered memory cases is a result of the "evolution of consciousness in our culture, resulting in a renewed awareness and ability to humanely respond to abuse. More and more [people] are remembering [their] childhood suffering as [they] sense the increased capacity for validation and healing from the world around [them]."³⁵ Fredrickson describes a victim's search for repressed memories as a journey of discovery and healing that leads one through times of severe distress to eventual serenity.³⁶

According to Fredrickson, one sign that an individual probably was abused as a child, and should consider commencing a journey of recovering repressed memories, is the inability to remember chunks of one's childhood.³⁷ As for patients who have vague suspicions that abuse may have occurred during their childhood, believers in repressed memory think "[i]t is far more likely that [a patient is] block-

28. Kandel & Kandel, *supra* note 2, at 33.

29. *Id.*

30. *Id.*

31. Bessel A. van der Kolk & Onno van der Hart, *The Intrusive Past: The Flexibility of Memory and the Engraving of Trauma*, 48 AM. IMAGO 425, 447 (1991).

32. RENEE FREDRICKSON, REPPRESSED MEMORIES: A JOURNEY TO RECOVERY FROM SEXUAL ABUSE 22 (1992).

33. *Id.* at 23.

34. *Id.* at 24.

35. *Id.*

36. *Id.* at 21, 25; see also BEVERLY ENGEL, THE RIGHT TO INNOCENCE 51-52 (1989).

37. FREDRICKSON, *supra* note 32, at 46-47.

ing the memories, *denying* it happened" than harboring false suspicions.³⁸ After the patient has recovered the repressed memories, a therapist may advise the patient of her options: to confront her abuser or to continue therapy without the confrontation.³⁹ Although some therapists believe that confronting the abuser is the most expedient way to heal,⁴⁰ conscientious therapists emphasize that the sole purpose of confrontation is to free the self, not to seek revenge of the accused abuser.⁴¹

Believers in recovered memory emphatically deny that therapists plant these memories in patients. They argue that "[people] in therapy are not that easily misled" and that therapy is "not mind control."⁴² Even if repressed memories are not literally true, they are symbolic of some terrible event or experience in the person's past, and uncovering and dealing with those memories is the only road to recovery for the patient.⁴³ Moreover, therapists argue that they have no incentive to believe "false" memories.⁴⁴ As Fredrickson put it, "Neither [a patient] nor [her] therapist want to accept a false reality as truth, for that is the very essence of madness."⁴⁵

Supporters of repressed memory therapy argue that child sexual abuse used to be the perfect crime.⁴⁶ Because sexual abuse occurred behind closed doors, there was little incriminating evidence left behind.⁴⁷ Only the word of a frightened child, who likely was too intimidated to speak out, threatened discovery.⁴⁸ Even if the victim, years later as an adult, accused the abuser, any potential legal action would have been time-barred.⁴⁹ Left without recourse for the injustice done

38. ENGEL, *supra* note 36, at 8.

39. FREDRICKSON, *supra* note 32, at 195-207.

40. *Id.* at 203.

41. *Id.* at 201.

42. ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE* 212 (1994) (quoting Ellen Bass, co-author of *THE COURAGE TO HEAL* (1988)).

43. FREDRICKSON, *supra* note 32, at 25.

44. *Id.* at 160.

45. *Id.*

46. Kandel & Kandel, *supra* note 2, at 38.

47. *Id.*

48. *Id.*

49. In recognition of the problem of repressed memories, many states have adopted equitable exceptions to the statute of limitations. Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1391-95 (1993) (discussing the delayed discovery rule, which permits an adult survivor of childhood sexual abuse an opportunity to file a cause of action); see also CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1995) (allowing a civil action to be filed any time "within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury . . . was caused by the sexual abuse"); Tim Reeves, *When Repressed Memory Becomes*

her, the victim was as helpless to seek redress as she was to prevent the abuse.

Now that therapists are beginning to unlock memories of abuse and legislatures are enacting statutes of limitation that take into account delayed discovery of the abuse,⁵⁰ supporters of repressed-recovered memories claim that the abusers are attempting to strike back.⁵¹ Supporters accuse the abusers of staging the repressed memory debate to discredit the adult victims' allegations; the debate, supporters contend, is the resultant "backlash against the struggle to bring child abuse out of the family closet."⁵² Supporters argue that there is no reason to mistrust the testimony of the child abuse survivor because the guilt and shame that accompany sexual abuse is enough to ward off false claims.⁵³

(2) Critics: The "False Memory Syndrome"

Critics cite to a severe, but not uncommon, repressed-recovered memory case as an example of what can happen to a vulnerable, unsuspecting patient: a woman seeking therapy for bulimia and mild depression is diagnosed, within a few sessions, as having multiple personalities and having been a victim of satanic ritual activities and child sexual abuse.⁵⁴ The critics believe that the real victims are the accused abusers.⁵⁵ Celebrity admissions have made being a child abuse victim almost fashionable.⁵⁶ Troubled adults are encouraged to lay blame on others to effectuate their own healing.⁵⁷ Critics say the finger pointing has "all the criteria of a witchhunt,"⁵⁸ and even with-

Reality: Proposed State Law Would Waive Statute of Limitations in Cases of Sexual Assaults on Children, PITTSBURGH POST-GAZETTE, May 26, 1994, at A1 (discussing legislative proposal to allow an adult of any age to file a cause of action within three years of the first recollection).

50. *Id.*

51. Kandel & Kandel, *supra* note 2, at 38.

52. *Id.*

53. Gangelhoff, *supra* note 1, at E1 (stating that there is "no prestige in being a victim of incest" (quoting Cassandra Thomas, director of the rape crisis center at the Houston Area Women's Center)).

54. *Id.* Gangelhoff discusses the case of Amy Smith, who went to see a therapist for bulimia and depression, was diagnosed with 13 personalities, and left therapy believing she had been raped and used for satanic rituals by her father. After recanting her stories, she now believes she was a victim of an overzealous therapist. *Id.*

55. John Hochman, "Recovered" Memory's Real Victims, L.A. TIMES, Nov. 18, 1993, at B7.

56. See Gangelhoff, *supra* note 1, at E1.

57. *Nightline: Controversy Over Repressed Memory in Child Abuse* (ABC television broadcast, Mar. 4, 1994, transcript no. 3335-2) [hereinafter *Nightline*] (comment of Chris Bury, *Nightline* reporter).

58. *Id.* (comment of Dr. Richard Gardner, professor of psychiatry at Columbia University).

out a conviction, reputation and family relations are destroyed by the mere accusation of child abuse.⁵⁹ The False Memory Syndrome Foundation (FMSF) was founded in 1992 to "learn more about why such accusations occur[], and to alert counseling professionals and lay persons to this special problem."⁶⁰ Without hard scientific evidence clearly supporting recovered memories, members of the FMSF think such unsubstantiated and highly suspect claims of abuse should not be allowed in civil or criminal actions.

Critics question why memories of *sexual abuse* are repressed, whereas other horrific events witnessed by children are not "forgotten."⁶¹ In fact, many argue that intense and emotionally charged events, such as sexual abuse, are among the least forgettable occurrences.⁶²

Elizabeth Loftus, well known for her research on reliability of eyewitness testimony, "cannot reconcile the theory of repressed memory with science."⁶³ Loftus' research suggests that therapists can easily plant false memories into the minds of their patients.⁶⁴ Loftus argues that therapists plant the memories of abuse into the minds of their patients through the use of repetitive suggestion,⁶⁵ and by counterarguing every doubt their patients have that buried memories of abuse exist.⁶⁶ Loftus contends that in her years of memory research she has been able to "implant false memories in people's minds, making them believe in characters who never existed and events that never happened."⁶⁷ As she describes it, memories are "creative blendings of fact and fiction."⁶⁸

In support of Loftus, Richard Ofshe⁶⁹ finds that false memories can be implanted using hypnosis.⁷⁰ He contends that even without

59. *Id.* (comment of Chris Bury, Nightline reporter).

60. Richard L. Peck, *The FMS Foundation: Fighting "False Memories,"* ALCOHOLISM & ADDICTION MAG., May 1993, at 18.

61. See Hochman, *supra* note 55, at B7. The Franklin case, although the stimulus of the debate, is not typical of the recovered memory cases that ensued. This Note will deal with the situation of adults' memories of their abuse as children.

62. *Id.*

63. Mark Sauer, *Repressed Memory Deconstructed As Quackery with a Heavy Price*, SAN DIEGO UNION-TRIB., Dec. 18, 1994, Books sec., at 4 (citing Elizabeth Loftus). Elizabeth Loftus is a researcher and professor at the University of Washington. Kandel & Kandel, *supra* note 2, at 34.

64. Philp, *supra* note 24.

65. LOFTUS & KETCHAM, *supra* note 42, at 25.

66. *Id.* at 24.

67. *Id.* at 5.

68. *Id.*

69. Ofshe is a researcher at the University of California at Berkeley. Kandel & Kandel, *supra* note 2, at 34.

70. *Id.* (quoting Ofshe).

hypnosis, suggestive techniques by therapists who are acting consciously or carelessly can lead to false memories.⁷¹

Some critics argue that mental health practitioners have plenty to gain from planting false memories of sexual abuse in troubled patients' minds.⁷² The process of unlocking these memories and dealing with their emotional repercussions can mean long-term therapy, the cost of which is generally covered by health insurance.⁷³ A less cynical yet still critical approach questions the techniques used in therapy.⁷⁴

C. Repressed Memory Therapy Techniques

In determining whether to impose liability, the conduct and techniques used by the therapist should be examined. The variety of subgroups encompassed within the mental health profession⁷⁵ makes it difficult to generalize methods of treatment. However, despite differences in approach, therapists usually employ at least one of three techniques in therapy: verbal communication (counseling),⁷⁶ hypnosis,⁷⁷ or drugs.⁷⁸ With the emergence of the self-help era, some therapists also use literature as a vehicle for their therapy.⁷⁹

71. *Id.* Loftus and Ketcham cite the case of Paul Ingram of Olympia, Washington, as an example of the suggestibility of people. LOFTUS & KETCHAM, *supra* note 42, at 227. Ingram, who initially denied all allegations of sexually abusing his two daughters, began to recall the incidents himself after repeated questioning by the police. *Id.* at 223. Ofshe, hired by the prosecution to interview Ingram, fabricated an incident of sexual abuse. *Id.* at 256. At first, Ingram denied knowledge or recollection of the event. *Id.* However, after Ofshe's encouragement to imagine the scene, he "developed detailed memories about the invented scenario." *Id.* at 257. Ofshe's interview with Ingram proved helpful to the defense, casting doubt on Ingram's previous admissions. *Id.* at 259.

72. Bill Taylor, *Therapist Turned Patients' World Upside Down*, TORONTO STAR, May 19, 1992, at C1.

73. *Id.*; see also Gangelhoff, *supra* note 1, at E1 (discussing two separate suits claiming that therapy was continued for the sole purpose of extracting the maximum amount from the patients' insurance carriers).

74. Gangelhoff, *supra* note 1, at E1.

75. The mental health profession is divided into numerous groups. There are psychoanalysts and psychotherapists, behaviorists, gestaltists, cognitivists, and developmentalists. Fundamental differences in theories and in therapy make generalizations difficult. Moreover, those with a medical degree may choose to use drugs in treatment; others may employ hypnosis or other techniques. See generally MORTON HUNT, *THE STORY OF PSYCHOLOGY* (1993).

76. See *infra* section I.C.1. "Verbal communication" is used to refer to therapy sessions that use verbal discussion (or even silence) as a means of communicating.

77. See Kandel & Kandel, *supra* note 2, at 34.

78. See *infra* section I.C.2.

79. See *infra* section I.C.3.

(1) Counseling

Therapists who believe people can repress memories view their job as helping the patient to remember and deal with these painful memories.⁸⁰ However, many therapists are criticized for using, either carelessly or manipulatively, false information and dubious therapy techniques to accomplish this goal.⁸¹ As Judith L. Herman, a leader in repressed-memory theory, has observed:

Therapists . . . sometimes fall prey to the desire for certainty. Zealous conviction can all too easily replace an open, inquiring attitude. In the past, this desire for certainty generally led therapists to discount or minimize their patients' traumatic experiences [T]he recent rediscovery of psychological trauma has led to errors of the opposite kind. Therapists have been known to tell patients, merely on the basis of a suggestive history or "symptom profile," that they definitely have had a traumatic experience Any expression of doubt can be dismissed as "denial."⁸²

One of the deplorable yet not uncommon methods used in therapy involves convincing patients that if they fail to remember the abuse they will never heal.⁸³ Other techniques include coercing patients into watching sexually explicit movies to "stimulate" memories of abuse⁸⁴ and pressuring patients to come up with memories while physically restraining them.⁸⁵ Although group therapy may seem beneficial to patients because it provides a nurturing atmosphere where they feel understood and supported, it can also be detrimental. Therapists who place clients in groups for satanic cult survivors or for multiple personalities may be establishing environments for patients to

80. Gangelhoff, *supra* note 1, at E1.

81. See, e.g., Jill Smolowe, *Dubious Memories*, TIME, May 23, 1994, at 51 (discussing the case of Ramona v. Isabella, No. C61989 (Cal. Super. Ct. Napa County 1994), in which a father sued his daughter's counselor and psychiatrist for planting false memories of sexual abuse; Holly Ramona's therapist incorrectly told her that she had probably been abused because 80% of all bulimia cases were caused by childhood sexual abuse); see also Hochman, *supra* note 55 (protesting the methods used by therapists, including telling patients that their eating, sexual or marital problems will not clear up unless they find and confront their lost memories); Betsy Rubiner, *Women Retract Allegations of Abuse*, DES MOINES REG., Nov. 29, 1993, at T1 (generally discussing untruths told by therapists to patients); David v. Jackson, No. 5406224 (Cal. Super. Ct. Sacramento County) (in which plaintiff alleges that David's therapists told her she has multiple personalities because she was an abuse survivor and all childhood sexual abuse victims develop multiple personalities).

82. Joy Lazo, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345, 1394 (1995) (quoting Judith L. Herman, Address at the Annual Meeting of the American Psychiatric Association 2 (May 22, 1994) (transcript on file with *Loyola of Los Angeles Law Review*)).

83. *Id.*

84. See Rubiner, *supra* note 81, at T1.

85. Gangelhoff, *supra* note 1, at E1 (relaying the story of Amy Smith, who had physical restraints on five points of her body while her therapist instructed her to remember the abuse).

feed off others' memories and problems that have nothing to do with their own.⁸⁶

Critics contend that even conscientious, less culpable therapists often carelessly use the power of suggestion to prompt patients to come up with memories of abuse.⁸⁷ Many patients are intimidated by therapists or want to please them, and will therefore "recall" nonexistent memories when faced with comments such as: "Are you sure you weren't abused? Try to picture a face. Was it this person? Concentrate!" This type of environment may be enough to solicit inaccurate memories from a vulnerable patient.⁸⁸

Nevertheless, other recovered-memory therapists vehemently deny their participation in recovering "false" memories⁸⁹ and advocate different memory recovery techniques to be used during therapy. These techniques include: (1) "imagistic" work,⁹⁰ in which patients are encouraged to focus on and develop flashes of memory; (2) dream work,⁹¹ during which one pays close attention to the patient's dreams and extracts symbolic messages or partial repressed memories;⁹² (3) body work,⁹³ in which one theorizes that the body stores memory as energy in parts of the body that were improperly touched, and subjects those parts to pressure releasing the energy-memory of the abuse;⁹⁴ and (4) art therapy,⁹⁵ in which patients draw pictures without consciously trying to control their outcome; therapists' interpretations of these drawings form the basis of the treatment.⁹⁶

86. Rubiner, *supra* note 81, at T1.

87. Robert Sheridan, *Salem Redux: Mixing Memory and Desire*, LEGAL TIMES, Oct. 24, 1994, at 24 (listing deceptive elements that therapists negligently introduce into therapy sessions, including: being the "source of the false influence; failing to detect false influences and [then] reinforcing them; [and] inventing worthless corroboration").

88. Gangelhoff, *supra* note 1, at E1 (describing similar comments used by therapists).

89. *Id.* Robin J. Burks, a therapist on the board of the Houston Psychological Association, claims that "[w]e don't make up details of [patients'] stories. We take a neutral listening stance. We don't encourage people to sue or confront perpetrators." *Id.*

90. FREDRICKSON, *supra* note 32, at 103. Fredrickson describes the technique as follows:

The images that surface from your unconscious to your conscious mind are fragments of a traumatic memory ready to emerge. These blips flashing across your mind may be mystifying or obscure at first glance, but they are an incomplete scrap from an abuse incident that you have buried. A piece of that incident has broken through and is poking into your conscious mind. Follow it down into your unconscious and you will retrieve a repressed memory.

Id. at 106.

91. *Id.* at 119.

92. *Id.* at 122-25.

93. *Id.* at 144.

94. *Id.* at 146.

95. *Id.* at 152.

96. *Id.*

(2) Hypnosis and "Truth" Drugs

Many of the patients who have recanted their recovered memories and who blame their therapists for planting those memories claim that the therapists used hypnosis or sodium amytal, the "truth serum," to induce false memories of sexual abuse and satanic rituals.⁹⁷ Hypnosis and drugs greatly increase one's susceptibility to suggestion.⁹⁸

The ease with which one can implant false memories while a patient is under hypnosis is well supported⁹⁹ and the reliability of sodium amytal in uncovering repressed memories is highly controversial.¹⁰⁰ California courts have recognized the unreliability of a person's testimony while under the influence of sodium amytal.¹⁰¹ Dr. Michael Orne, a psychiatrist who pioneered the research of this drug, testified that the methods are "not useful in ascertaining 'truth' The patient becomes sensitive and receptive to suggestions due to the context and to the comments of the interviewers."¹⁰² Although some therapists may unwittingly suggest the existence of past abuses while a patient is under the effects of sodium amytal, others tell their patients that whatever they say and remember while under sodium amytal must be the truth.¹⁰³

(3) Self-Help Books

The self-help phenomenon has led to a massive market in the literary world for self-help books. Many of these books are geared toward survivors of sexual abuse.¹⁰⁴ The inherent problem is that the books diagnose the reader's situation and prescribe a remedy without any personal contact with the reader. Some of these books are written by people with no formal training in child sexual abuse or memory

97. See Rubiner, *supra* note 81, at T1. Former patients of Diane Humenansky have sued her for allegedly planting false memories of abuse by using hypnosis and sodium amytal to encourage them to produce memories of sexual abuse. *Id.* One former patient even claims that Humenansky "coerced her into viewing films of sexual perversion and satanic rituals designed to 'stimulate repressed memories' of childhood abuse." *Id.*

98. Kandel & Kandel, *supra* note 2, at 34.

99. *Id.*

100. Sauer, *supra* note 12, at A3. The therapist in *Ramona v. Isabella*, No. C61989 (Cal. Super. Ct. Napa County 1994) admitted to telling patients that while under the influence of sodium amytal they had to be telling the truth. Sauer, *supra* note 12, at A6.

101. See *People v. Johnson*, 109 Cal. Rptr. 118, 126-27 (Ct. App. 1973).

102. Smolowe, *supra* note 81, at 51. Dr. Martin Orne of the University of Pennsylvania testified to this at the *Ramona* trial, in which a California jury awarded \$500,000 to the father of the patient after his successful third-party suit against the therapists for planting false memories of sexual abuse in his daughter's mind. *Id.*

103. The psychologist in the *Ramona* case used this tactic to convince Holly Ramona that "while under the drug's influence . . . she *had* to be telling the truth." Sauer, *supra* note 12, at A6.

104. See, e.g., ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL* (1988).

theory.¹⁰⁵ These self-help books are highly suggestive,¹⁰⁶ and some go so far as to make blanket statements such as "[i]f you think you were abused and your life shows the symptoms, then you were."¹⁰⁷

D. Patient's Belief in the Truth of the "Memories"

A major problem with repressed memory therapy is that once memories, false or real, are "recalled," the patient becomes convinced of their truth. Some experts refer to this problem as "source amnesia,"¹⁰⁸ while others term it "memory hardening."¹⁰⁹ Source amnesia refers to the "inability to recall the origin of the memory of a given event."¹¹⁰ Researchers explain that "[o]nce the source of a memory is forgotten, people can confuse an event that was only imagined or suggested with a true one. The result is a memory that feels authentic" although it is not.¹¹¹ Memory hardening refers to a similar problem. Upon recollecting past abuses, perhaps aided by hypnosis or drugs, a patient's memory hardens, and what may start as a hazy flash gradually becomes a vivid memory that the person is convinced is real.¹¹²

Although considered a critic of recovered memory, Elizabeth Loftus is careful to point out that "[t]o say that memory might be false does not mean that the person is deliberately lying."¹¹³ A patient might actually use false memories

as a way to provide a screen for perhaps more prosaic but, ironically less tolerable, painful experiences of childhood. Creating a fantasy of abuse with its relatively clear-cut distinction between good and evil may provide the needed logical explanation for confusing experiences and feelings. The core material for the false memories

105. Hochman, *supra* note 55, at B7.

106. Isabelle Coté, *False Memory Syndrome: Assessment of Adults Reporting Childhood Sexual Abuse*, 20 WAYNE L. REV., 427 (1993). Coté discusses concerns about the instructive and suggestive words used in BASS & DAVIS, *supra* note 104. For example, the book "encourages revenge, anger, fantasies of murder, confrontations, and law suits against the alleged perpetrator[s]." Coté, *supra*, at 430.

107. BASS & DAVIS, *supra* note 104, at 22; see also *Nightline*, *supra* note 57 (comment of Nightline reporter Chris Bury discussing BASS & DAVIS); Jim Schnabel, *The 65 Faces of Donna*, THE INDEPENDENT (London), Oct. 24, 1993, at 10. Richard Ofshe has referred to Ellen Bass and Laura Davis as "back-alley butchers of the mind." Sauer, *supra* note 63, at 4.

108. Sheridan, *supra* note 87, at 24 (citing to a NEW YORK TIMES account of a neuroscience conference at the Harvard Medical School in May 1995).

109. *Rock v. Arkansas*, 483 U.S. 44, 60 (1987).

110. Sheridan, *supra* note 87, at 24.

111. *Id.*

112. *Rock*, 483 U.S. at 60.

113. Elizabeth F. Loftus, *The Reality of Repressed Memories*, AM. PSYCHOLOGIST, May 1993, at 518, 525.

can be borrowed from the accounts of others who are either known personally or encountered in literature, movies, and television.¹¹⁴

For those patients who maintain that their memories are true, amended statutes of limitation have made it possible for them to bring claims against their alleged abusers. Many state legislatures have amended statutes of limitation with respect to child sexual abuse claims, allowing for delayed discovery of the abuse to trigger the running of the statutes.¹¹⁵

Patients who ultimately recant their stories and believe their therapists acted negligently can bring claims for malpractice or IIED or NIED against their therapists. However, the question remains whether accused abusers should have the same rights to bring claims against the therapists.

II. Relationship of the Mental Health Profession to the Law: Evolution of Legal Duties

The mental health profession, regarded with suspicion for many years,¹¹⁶ finally gained recognition in the legal arena when therapists were accepted into the courtroom as expert witnesses.¹¹⁷ As the once unheard-of issue of child sexual abuse began to emerge,¹¹⁸ the need for psychologists as expert witnesses increased.¹¹⁹ By the 1980s,

114. *Id.*

115. At least 22 states have relaxed their statutes of limitations for claims by survivors of child sexual abuse. Carol McHugh, *Suits Claiming Childhood Sex Abuse on the Rise; Lawyers, Experts Question 'Recovered Memories'*, CHI. DAILY L. BULL., Sept. 22, 1993, at 1; see, e.g., CAL. CIV. PROC. CODE § 340.1(a) (West Supp. 1995). The California statute provides that

the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or *within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse . . .*

Id. (emphasis added). But see *Courts of Common Pleas*, PA. L. WKLY., Oct. 3, 1994, at 17 (discussing court of common pleas holding that "repressed memory does not toll the statute of limitations").

116. See, e.g., HERBERT DÖRKEN ET AL., *THE PROFESSIONAL PSYCHOLOGIST TODAY: NEW DEVELOPMENTS IN LAW, HEALTH INSURANCE, AND HEALTH PRACTICE* 21 (1976). Psychology first became prevalent as a mental health profession in the United States in the 1940s. Prior to that, psychology focused on research and academia which were considered more grounded and scientific than counseling. The movement towards counseling met with much resistance. *Id.* at 1-18. As one commentator put it, mental health professionals are the "Rodney Dangerfields of the medical profession. They get no respect." Suzanne Fields, *Cure Mental Health Care Before Reform Catches It*, INSIGHT ON THE NEWS, April 25, 1994, at 40.

117. See, e.g., *United States v. Brawner*, 471 F.2d 929 (D.C. Cir. 1972); *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962).

118. See *supra* text accompanying notes 2-4.

119. Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 CARDOZO L. REV. 2027, 2028-29 (1994).

courts routinely allowed psychologists to testify as expert witnesses in child sexual abuse cases.¹²⁰ Therapists played an important role as expert witnesses in these cases, as well as in repressed memory cases.¹²¹ The mental health profession's relationship with the legal profession progressed with therapists' cross-pollination into the legal field as expert witnesses.

As this relationship has developed, legal standards have evolved to address therapists' unique role in society. Most notably, legal standards have developed in the areas of therapist-client privilege and duties to warn. The policies underlying these standards provide insight into the appropriate standards for evaluating therapists' conduct in recovered memory situations.

A. Privileged Relationship

Many relationships, such as the one between lawyer and client, enjoy a privileged status under the law.¹²² These relationships tend to require a high degree of trust for their success. To promote this trust, the law allows the parties to refuse to disclose information discussed within the scope of these relationships.¹²³

One such privileged relationship is that between therapist and patient.¹²⁴ The importance of trust and confidentiality is particularly strong in this relationship because the patient shares her most intimate and personal thoughts with the therapist. To be able to open oneself to another "requires an atmosphere of unusual trust, confidence and tolerance."¹²⁵ For this reason, it is particularly important to protect the therapist-patient relationship. Because mental health is primarily assessed and treated through communication, "[p]atients

120. *Id.* The admissibility of expert testimony is still subject, as is all evidence, to the "probative value versus prejudice" balancing test. *See, e.g.,* *United States v. Hadley*, 918 F.2d 848, 853 (9th Cir. 1990). Federal Rule of Evidence 401 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 401.

121. Askowitz & Graham, *supra* note 119, at 2028-29.

122. CAL. EVID. CODE §§ 950-1034 (West 1992). The Evidence Code of California recognizes many privileged relationships. Article 3 protects lawyer-client communications; Articles 4 and 5 recognize privileges between married people; Article 6 deals with physician-patient communication; and Article 8 protects clergyman-penitent relationships. *Id.*

123. *Id.*

124. *Id.* Article 7 recognizes a psychotherapist-patient privilege. *Id.* Likewise, the American Psychological Association recognizes a duty of confidentiality. JANE CLAPP, PROFESSIONAL ETHICS AND INSIGNIA 628 (1974). Members of the APA have a professional obligation not to disclose information that has been "obtained . . . in the course of [their] teaching, practice, or investigation." *Id.*

125. *United States v. Willis*, 737 F. Supp. 269, 274 (S.D.N.Y. 1990) (quoting *Doe v. Roe*, 400 N.Y.S.2d 668, 674-75 (Sup. Ct. 1977) (quoting Melvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, 30 TEMP. L.Q. 401, 405-06 (1957))).

will be helped only if they can form a trusting relationship with the [therapist].¹²⁶ Some legal commentators consider the therapist-patient relationship to be even more important than the physician-patient relationship.¹²⁷

By affording special immunities to therapists, the law recognizes the importance of protecting the relationship. To the same end, the law recognizes an important duty of care owed by therapists to their patients and permits patients to recover when that duty has been breached.¹²⁸ The duty owed by therapists to third parties, however, is still somewhat unclear.¹²⁹

B. Duty to Warn

The California Supreme Court, in *Tarasoff v. Regents of the University of California*,¹³⁰ established that therapists may be liable to identifiable third parties for failure to warn them about potential physical violence by their patients.¹³¹ This holding acknowledges that a psychologist's obligations in connection with treating a patient are not confined to the therapy room. Individuals outside of the therapist-patient relationship can be severely and detrimentally affected by the therapist's action or failure to act.¹³²

The patient in *Tarasoff*, Mr. Poddar, had displayed violent tendencies and was diagnosed by the psychologist as dangerous.¹³³ After this diagnosis, Poddar confided to his psychologist that he intended to kill his girlfriend, Ms. Tarasoff.¹³⁴ The psychologist notified campus police and requested that Poddar be confined;¹³⁵ however, Poddar evaded the police and carried out his intention.¹³⁶ The court did not consider the psychologist's response adequate and held that a cause of

126. *Id.*

127. Steven R. Smith, *Mental Health Malpractice in the 1990s*, 28 Hous. L. Rev. 209, 270 n.359 (1991) (arguing that therapist-patient relationship is more sensitive than doctor-patient relationship and therefore requires greater protection).

128. Andrews, *supra* note 1, at 13 (discussing the increasing number of patients recanting their "recovered memories" and bringing malpractice suits against their therapists).

129. See *infra* subparts III.A-C.

130. 551 P.2d 334 (Cal. 1976).

131. *Id.* at 345-46.

132. See, e.g., Smolowe, *supra* note 81, at 51 (discussing *Ramona v. Isabella*, No. C61989 (Cal. Super. Ct. Napa County 1994), in which Mr. Ramona claimed that the false memories planted by his daughter's family counselor and psychiatrist led to the breakup of his marriage and to his dismissal as vice president of the Mondavi winery in Napa, a \$400,000-a-year position).

133. *Tarasoff*, 551 P.2d at 345.

134. *Id.* at 341.

135. *Id.*

136. *Id.*

action against him still existed for "fail[ing] to exercise reasonable care to protect [Ms. Tarasoff]" from physical violence.¹³⁷ The court noted that therapists cannot accurately predict future violent behavior of patients,¹³⁸ but it responded that a "perfect performance"¹³⁹ is not expected of psychologists; they are required only to exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances."¹⁴⁰

C. Policy Comparisons

As evidenced by the protective privilege, the law places great importance on the therapist-patient relationship and its focus on healing the patient.¹⁴¹ The privilege helps to create an environment where the patient can express whatever she wants and protects this relationship from outside interference in order to effectuate the goal of healing. In the context of repressed and recovered memories, holding therapists legally liable to individuals outside the therapist-patient relationship would be inconsistent with the policies underlying the evidentiary privilege. Holding therapists accountable to third parties for alleged

137. *Id.* at 341, 353. California's present rule on the duty of therapists to warn third parties of threatened violent behavior by a patient is as follows:

A psychotherapist has *no* duty to warn third persons of a patient's threatened violent behavior, *nor* any duty to predict such behavior or to protect third persons from such behavior, *unless* the patient has communicated to the psychotherapist a *serious threat of physical violence* against [a] reasonably identifiable potential victim[s].

COMMITTEE ON STANDARD JURY INSTRUCTIONS, CIVIL, SUPERIOR COURT OF L.A. COUNTY, CALIFORNIA JURY INSTRUCTIONS, CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS No. 6.00.2 (8th ed. 1994) [hereinafter BAJI] (emphasis added).

138. *Tarasoff*, 551 P.2d at 344-45; *see also* Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1975). A review of five studies concluded that psychologists made correct predictions of future violent behavior one-third of the time. John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10, 10-15 (1984). *But cf.* Barefoot v. Estelle, 463 U.S. 880 (1983) (holding that regardless of statistics showing incorrect predictions of violence, testimony by psychologists regarding such predictions is not necessarily unreliable and was admissible even in a death penalty case).

139. *Tarasoff*, 551 P.2d at 345.

140. *Id.* (quoting *Bardessono v. Michels*, 478 P.2d 480, 484 (Cal. 1970)). Another concern with the "reasonable professional" standard enunciated by the *Tarasoff* court is the mental health profession's lack of comprehensive standards. DÖRKEN, *supra* note 116, at 25. Specifically, the lack of standards has been cited as one of the main problems in false memory cases. Ira H. Leesfield, *Negligence of Mental Health Professionals: What Conduct Breaches Standards of Care*, TRIAL, March 1987, at 57. Determining what action is ordinary and reasonable in a profession with many subgroups and few comprehensive regulations can prove to be a difficult task.

141. *See supra* subpart II.A.

negligent conduct that is part of therapy may undermine the ultimate goal of helping the patient.

The court in *Tarasoff* imposed no duty on therapists to prevent physical harm to third parties,¹⁴² and even recognized the difficulty therapists have in predicting violent behavior.¹⁴³ Likewise, therapists should not be required to predict or evaluate the validity of patients' recovered memories or to discourage patients from confronting their alleged abusers if confronting them would be an important step in the healing process.

Even when the law has recognized a duty to third parties, as in *Tarasoff*, it has extended that duty only to require that therapists warn identifiable third parties of the risk of *physical* violence by a patient.¹⁴⁴ An accused abuser is not in danger of physical violence or even of any physical impact. The claimed harm arises from the public stigma accompanying the accusation. The law often distinguishes between the risk of physical injury and other injuries;¹⁴⁵ in fact, a basic requirement for NIED claims is that the party suffer physical injury or impact.¹⁴⁶ Moreover, the court in *Tarasoff* used a negligence standard to determine whether a third party could recover damages from a therapist. This standard also would be inappropriate for determining a therapist's duty to an accused in recovered-memory situations. The *Tarasoff* court's instruction that therapists use the "reasonable degree of skill, knowledge, and care" that other therapists would use in similar situations would prove to be a particularly difficult standard in light of the vast differences in beliefs and techniques about repressed memory.¹⁴⁷

Nevertheless, because the emotional damage done to third parties, particularly the accused abusers in recovered-memory situations, can be so severe, and because some therapists employ outrageous therapy techniques,¹⁴⁸ some form of liability should be imposed. As Part IV of this Note argues, claims by third parties of *intentional* infliction of emotional distress against a therapist should survive in the courts.

142. *Tarasoff*, 551 P.2d at 345. Although the court imposed a duty to warn the identifiable third party or law enforcement agent of the possible future harm, if that duty was discharged properly, there was no further duty to prevent the harm from occurring and a therapist would not be liable under *Tarasoff*.

143. *Id.*

144. *See supra* subpart II.B.

145. *See id.*; *see also infra* text accompanying note 165.

146. *See infra* text accompanying note 165.

147. *See supra* subpart I.B. (discussing different theories regarding repressed memory); *see also supra* subpart I.C. (discussing different therapy techniques).

148. *See supra* subpart I.C.

III. The Accused Abuser's Standing to Sue

A. Introduction: Negligent Infliction of Emotional Distress

Gary Ramona, a successful Mondavi winery executive, was accused by his daughter, Holly, of sexually abusing her during her childhood.¹⁴⁹ Holly began having flashbacks of the alleged abuse a few months after beginning therapy for bulimia.¹⁵⁰ She remembered a dozen incidents of abuse, and with the aid of sodium amytal was able to recall specific details of the molestations.¹⁵¹ Holly arranged to have her father meet her at her therapists' office where she confronted him with the allegations.¹⁵² The next day, Gary Ramona's wife served him with divorce papers and within the year he was fired from his job.¹⁵³ Ramona subsequently filed suit against his daughter's therapists, alleging that he was a "direct victim" of the therapists' negligent treatment of his daughter.¹⁵⁴

The defense attorneys in the highly publicized *Ramona v. Isabella* case¹⁵⁵ urged the Napa County, California superior court judge to find that Gary Ramona had no standing to sue his daughter's therapists for NIED.¹⁵⁶ The judge declined and instead found that the 1980 California Supreme Court case, *Molien v. Kaiser Foundation Hospitals*,¹⁵⁷ allowed Ramona to bring an emotional distress claim against his daughter's therapists as a "direct victim" of their negligence.¹⁵⁸ The defense lawyers contended that subsequent cases have severely limited, if not implicitly overruled, *Molien*.¹⁵⁹ They maintained that the therapists had no duty to prevent harm to Gary Ramona; the only duty of care owed by the therapists was to their patient.¹⁶⁰ The jury disagreed and awarded Ramona \$500,000 in damages.¹⁶¹

In at least two other cases, third parties have succeeded in recovering damages from therapists for negligence in recovering "repressed

149. Smolowe, *supra* note 81, at 51.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. McKee, *supra* note 13, at 12.

155. *Ramona v. Isabella*, No. C61898 (Cal. Super. Ct. Napa County 1994).

156. McKee, *supra* note 13, at 1.

157. 616 P.2d 813 (Cal. 1980).

158. McKee, *supra* note 13, at 1.

159. *Id.*

160. *Id.*

161. *Id.*

memories."¹⁶² More third-party suits, seeking damages from therapists for NIED, continue to be filed.¹⁶³

According to the traditional notion of NIED, these claims would not have been permitted. Traditionally, NIED "is not [considered] an independent tort but the tort of *negligence*, involving the usual duty and causation issues."¹⁶⁴ For a plaintiff to recover damages for emotional distress, the general rule in California is that recovery "is allowed where there is *physical impact* . . . [or], although there is no impact, there is *physical injury*."¹⁶⁵ The California Supreme Court departed from this rule in *Dillon v. Legg* when it allowed a bystander who had witnessed an injury to a third person a right of action for NIED.¹⁶⁶ The bystander was neither physically impacted nor directly injured by the tortfeasor; however, the court found that the bystander could, subject to several limitations, recover for emotional distress.¹⁶⁷

162. Thom Weidlich, "False" Memory, *Big Award*, NAT'L L.J., Jan. 9, 1995, at A6 (discussing the three cases—*Althaus v. Cohen*, *Khatain v. Jones*, and *Ramona v. Isabella*—in which third parties have successfully sued therapists for false repressed memories). In *Althaus*, the Allegheny County Court of Common Pleas in Pennsylvania awarded more than \$272,000 to Ms. Althaus and her parents for negligence in her treatment. *Id.* A few days before, in *Khatain*, a Dallas, Texas, jury awarded \$350,000 to the parents of a patient, *id.*, who was undergoing psychological treatment for multiple personalities and repressed memories of child sexual abuse. See *Khatain v. Jones*, No. 05-92-01794-CV, 1993 WL 240049 (Tex. Ct. App. 1993). Although the parents in *Khatain* originally sought damages for NIED, after *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), claims for NIED are no longer recognized in Texas. *Id.*

163. See, e.g., *David v. Jackson*, No. C5406224 (Cal. Super. Ct. Sacramento County June 21, 1994) (plaintiffs, consisting of patient and her family, filed action against therapist and hospital alleging, among other things, negligent infliction of emotional distress for allegedly encouraging patient to develop false memories of childhood sexual abuse).

164. 6 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW, Torts § 838 (9th ed. 1988). Duty is "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." WILLIAM L. PROSSER, LAW OF TORTS 324 (4th ed. 1971). Causation requires that there be "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff suffered." *Id.* at 236.

165. *Id.*

166. *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968) (allowing NIED recovery to a mother who witnessed her child's death in an accident caused by a negligent driver).

167. *Id.* at 920. The court listed three factors in determining whether an injury to a bystander is reasonably foreseeable:

- (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
- (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
- (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Id.

B. *Molien's* "Direct Victim"

In *Molien v. Kaiser Foundation Hospitals*,¹⁶⁸ the California Supreme Court further extended the general rule, which would have denied recovery of damages for NIED absent physical injury, by permitting such a recovery. In *Molien*, a doctor negligently diagnosed the plaintiff's wife as having contracted syphilis.¹⁶⁹ The doctor then instructed the patient to advise her husband of the diagnosis so that he might undergo blood tests to determine if he, too, had contracted the disease.¹⁷⁰ As a result of the diagnosis, the couple traded accusations and suspicions of extramarital affairs that ultimately led to the breakup of the marriage.¹⁷¹

In permitting plaintiff's NIED claim to go forward, the court found that "the risk of harm to plaintiff was reasonably foreseeable to defendants."¹⁷² The court found that it was "easily predictable that an erroneous diagnosis of syphilis and its probable source would produce marital discord and resultant emotional distress to a married patient's spouse."¹⁷³ Of greatest import was the *Molien* court's treatment of the plaintiff husband as a "direct victim."¹⁷⁴ The court held that "[b]ecause the risk of harm to [the plaintiff] was reasonably foreseeable . . . under these circumstances defendants owed plaintiff a duty to exercise due care in diagnosing the physical condition of his wife."¹⁷⁵ *Molien's* "direct victim" doctrine emerged as a parallel but distinct cause of action from the *Dillon* "bystander" plaintiff doctrine.¹⁷⁶ The broad language of *Molien* marked the abrogation in California of the general rule that in order to recover for NIED some physical injury must be sustained.¹⁷⁷ *Molien* established a new cause of action based only on the foreseeability of causing emotional harm.¹⁷⁸

In *Burgess v. Superior Court*,¹⁷⁹ the California Supreme Court permitted a mother to state a claim for NIED against the physician

168. 616 P.2d 813 (Cal. 1980).

169. *Id.* at 814.

170. *Id.*

171. *Id.* at 814-15.

172. *Id.* at 817 (finding that reasonableness of foreseeability was confirmed by doctor's instruction that patient advise husband of diagnosis).

173. *Id.*

174. *Id.* at 816.

175. *Id.* at 817.

176. *Id.* at 816.

177. *See id.* at 823 (Clark, J., dissenting).

178. *Id.* at 825 (commenting that "[w]hen defendant's act is merely negligent rather than intentional, lesser moral blame attaches, cautioning against extending liability . . . [And w]here, as here, imposition of liability is far disproportionate to the degree of culpability, we do a disservice to the public . . . by sanctioning claims for hurt feelings.").

179. 831 P.2d 1197 (Cal. 1992).

who was alleged to have negligently delivered her baby.¹⁸⁰ This holding accords with *Molien* because the mother was not physically injured or impacted by the physician's negligence. Although the court did not overrule *Molien*, the *Burgess* court distinguished its holding from *Molien*'s and based recovery on the pre-existing relationship between the mother and the obstetrician, a relationship that was not present between the plaintiff and the defendant in *Molien*.¹⁸¹

The *Burgess* court criticized *Molien*'s broad language, saying that "*Molien* introduced a new method for determining the existence of a duty, limited only by the concept of foreseeability. To the extent that *Molien* stands for this proposition, it should not be relied upon and its discussion of duty is limited to its facts."¹⁸² The court reiterated the long held belief that "foreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope" of injuries giving rise to NIED actions.¹⁸³ The *Burgess* court then took the opportunity to redefine the meaning of "direct victim" based upon the facts in *Molien*. The court in *Burgess* expressly limited *Molien* to its facts, stating:

[T]he label "direct victim" arose to distinguish cases in which damages for serious emotional distress are sought as a result of a breach of duty owed the plaintiff that is "*assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.*"¹⁸⁴

Emphasizing that NIED is not an independent tort, the *Burgess* court required that the traditional negligence elements of duty, breach, causation, and damages be present.¹⁸⁵ The court held that, absent physical injury, damages for NIED could be recovered only "in cases where a duty arising from a preexisting relationship is negligently breached."¹⁸⁶ Applying the preexisting duty requirement to the facts of the case, the court held that the preexisting doctor-patient relationship between the plaintiff and her obstetrician satisfied that requirement, and allowed the plaintiff to recover as "direct victim."¹⁸⁷

In *Huggins v. Longs Drug Stores California, Inc.*,¹⁸⁸ the California Supreme Court again limited the applicability of *Molien*'s "direct victim."¹⁸⁹ It reversed the lower court's decision that the parents of

180. *Id.* at 1198.

181. *Id.* at 1202.

182. *Id.* at 1201 (citation omitted).

183. *Id.* (quoting *Thing v. LaChusa*, 771 P.2d 814, 826 (Cal. 1989)).

184. *Id.* (emphasis added) (quoting *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278, 282 (Cal. 1989)).

185. *Id.* at 1200.

186. *Id.* at 1201.

187. *Id.* at 1204.

188. 862 P.2d 148 (Cal. 1993).

189. *Id.* at 149.

an infant whose pharmacist negligently labeled medication could recover as direct victims.¹⁹⁰ The court took issue with the lower court's finding that "when a pharmacist knows, or should know, that a prescription is for an infant or other helpless patient, the pharmacist's duty of care extends not only to the patient but also to the patient's parent[,] . . . who in fact administers the medication."¹⁹¹ Instead, the court refused to find that the parents were direct victims because the parents were not themselves the patients for whom the medicine was prescribed.¹⁹²

The *Huggins* court bolstered its position by citing to *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*¹⁹³ In *Marlene F.*, three mothers were allowed emotional distress claims against the therapists who were treating both them and their sons. Although the therapists had molested the *sons* during therapy sessions, the *mothers* were allowed to recover as direct victims.¹⁹⁴ Here, too, the mothers' direct victim status was based on their preexisting relationships with the therapists.¹⁹⁵

The *Huggins* court explained that in *Molien*, the physician assumed a direct duty toward the husband by instructing the wife to tell him of the diagnosis; direct victim liability was based only upon this assumption of a direct duty.¹⁹⁶ However, the court in *Huggins* found no parallel assumption of a duty by the pharmacist to the infant's parents.¹⁹⁷

Finally, in *Schwarz v. Regents of the University of California*,¹⁹⁸ a California court of appeal denied a father direct victim status in pursuing an NIED claim against his son's therapist.¹⁹⁹ The young boy, who was being treated for bed-wetting and an adjustment disorder,²⁰⁰ was taken out of the country by his mother.²⁰¹ Alleging severe emotional injury when the mother fled the country with his son, the father brought an action for NIED against the therapist who had aided and encouraged the mother in her plan.²⁰² The father claimed that his emotional injury was a foreseeable consequence of the therapist's con-

190. *Id.* at 149-50.

191. *Id.* at 151.

192. *Id.* at 153.

193. 770 P.2d 278 (Cal. 1989).

194. *Huggins*, 862 P.2d at 152 (citing *Marlene F.*, 770 P.2d at 279).

195. *Id.* (citing *Marlene F.*, 770 P.2d at 279).

196. *Id.* (citing *Molien* for proposition that by instructing wife to advise her husband of diagnosis, physician assumed duty to husband).

197. *Id.* at 153.

198. 276 Cal. Rptr. 470 (Ct. App. 1990).

199. *Id.* at 483.

200. *Id.* at 471.

201. *Id.*

202. *Id.*

duct and that he was a direct victim of the therapist's negligence.²⁰³ He argued that in arranging for the father to participate in sessions with the son, the therapist had assumed a duty to the father.²⁰⁴

The court found that although the father had participated in therapy sessions with the therapist, he was obviously not a patient himself.²⁰⁵ The court noted that although plaintiff suffered "an adverse consequence . . . the defendant's conduct [was not] directed at the third party," and plaintiff therefore failed to gain direct victim status.²⁰⁶ In discussing *Marlene F.*, the *Schwarz* court found a clear implication that the court would not have held the mothers to be direct victims "had the therapists treated the sons only for the purpose of resolving the sons' individual emotional problems, even if these problems led to family difficulties."²⁰⁷ The court concluded that although the father was brought in for therapy sessions, it was solely for the benefit of the son's treatment; therefore, no direct duty was assumed by the therapist.²⁰⁸ The *Schwarz* court denied the father's NIED claim because it fit neither the traditional NIED rule requiring physical injury or impact,²⁰⁹ nor the direct victim rule requiring a pre-existing relationship.²¹⁰

C. The Accused Abuser As Direct Victim

Accused abusers, including Gary Ramona, have attempted to claim that they are direct victims of negligent conduct by therapists who are treating loved ones. They argue that therapists can reasonably foresee the risk of harm to the alleged abusers and owe them a duty of care.²¹¹

However, as pointed out by the *Burgess* court, "foreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope" of NIED claims.²¹² In order to find that a duty exists, the duty must be one that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two [parties]."²¹³

203. *Id.*

204. *Id.* at 478.

205. *Id.*

206. *Id.* at 479.

207. *Id.* at 478.

208. *Id.* at 478-79.

209. *Id.* at 476.

210. *Id.* at 478.

211. See, e.g., *Ramona v. Isabella*, No. C61898 (Cal. Super. Ct. Napa County 1994).

212. *Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992) (quoting *Thing v. LaChusa*, 771 P.2d 814, 826 (Cal. 1989)).

213. *Id.* (quoting *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, 770 P.2d 278, 282 (Cal. 1989)).

In *Molien*, the doctor's instruction to the wife to advise her husband of the diagnosis was a significant factor evidencing that the doctor assumed a duty to the husband.²¹⁴ Likewise, the *Ramona* jurors found that the therapists assumed a duty of care to plaintiff Ramona when they encouraged the daughter to confront him with accusations of abuse.²¹⁵

However, the *Ramona* outcome is inconsistent with the line of cases following *Molien*. The rule of law that seems to emerge from these cases is that "[a] parent of a child may not recover as a direct victim of emotional distress negligently caused by the child's health care provider [*Huggins*], unless the parent is also the patient of the defendant [*Burgess*], and the emotional condition of the parent is an object of the treatment [*Marlene F. and Schwarz*]."²¹⁶ Applying this standard, claims that third parties, like father Gary Ramona, are direct victims of therapists' negligence should not be recognized because such third party claims do not survive any of the limitations of *Molien*'s "direct victim" status established in the subsequent case law.

For example, any claim that Ramona was the therapist's "patient" is meritless. Although Ramona participated in therapy sessions, the sessions were solely to benefit his daughter's mental condition. The *Schwarz* court addressed this same situation and refused to find that the father was a patient or a direct victim.²¹⁷ Moreover, there was no preexisting relationship between Ramona and the therapists, so that, according to the holding in *Burgess*, Ramona should not have been considered a direct victim.²¹⁸

214. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 817 (Cal. 1980).

215. *The Comeback Kids*, THE RECORDER (S.F.), Dec. 29, 1994, at 1. Some questions remain about the proper jury instructions for burden of proof and preponderance of evidence. See Mike McKee, *Defense May Not Need Appeal*, THE RECORDER (S.F.), June 1, 1994, at 13 (questioning jury instruction in *Ramona* case to find whether defendants implanted or reinforced false memories and noting contention that instruction left no choice for jurors but to find guilty; an instruction to find whether defendants implanted and reinforced false memories would have been less controversial). In order to find liability, nine of the twelve jurors needed to find that "one or more of the defendants implanted or reinforced the memories and that Ramona suffered injury as a result of negligence." *Recovered Memory Goes to Trial*, THE LEGAL INTELLIGENCER, May 13, 1994, at 5.

216. McKee, *supra* note 13, at 1 (quoting Sharon Chandler, defense co-counsel for the therapist in the *Ramona* case).

217. *Schwarz v. Regents of the Univ. of Cal.*, 276 Cal. Rptr. 470, 478-79 (Ct. App. 1990).

218. *Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992).

IV. A Proposal

A. Negligent Infliction of Emotional Distress: Improper Standard for *Ramona*-Type Claims

Gary Ramona's claim of NIED against his daughter's therapists should not have been allowed. First, he lacked standing because he was not a direct victim under the post-*Molien* line of cases; second, NIED is an inappropriate standard to determine therapists' liability in repressed memory cases.

According to California civil jury instructions, the elements of a claim for NIED are as follows "1. The defendant engaged in [negligent conduct]; 2. The plaintiff suffered serious emotional distress; [and] 3. The defendant's [negligent conduct] was a cause of the serious emotional distress."²¹⁹

This standard is too low for imposing liability on therapists in repressed memory situations because it undermines therapists' ultimate goal of helping the patients to hold them to unreasonably high standards of care towards third parties with whom they have no professional relationship. When the emotional injury complained of by a third party relates to the treatment and therapy of a patient, granting that third party direct victim status to sue the therapist for NIED would be antithetical to recognized policies protecting the relationship between a therapist and her patient.

Therapists cannot be expected to determine the absolute truth and validity of a patient's memories.²²⁰ A therapy session is not a fact-finding procedure in search of the truth. The therapist must establish an environment in which the patient can open up and freely discuss her thoughts, fears, and memories. It is the role of the therapist to help the patient through her depression or confusion to a healthy state of mind. This process would be thwarted if the therapist resorted to interrogating a patient in an attempt to protect herself from potential liability. And if in fulfilling her duty to her patient, a therapist finds that a necessary step to healing includes encouraging her patient to confront the alleged abuser, the therapist should not be barred from doing so for fear of liability from the third-party accused.

Nevertheless, third parties can be severely harmed by these confrontations and accusations. Because some of these memories are false, and are "recovered" only after the use of suggestive therapeutic techniques, some recourse must be available to injured third parties.

219. BAJI, *supra* note 137, No. 12.80.

220. Just as therapists cannot accurately predict future violent behavior of a patient, they cannot be expected to accurately discern true from false memories. See *supra* note 138 and accompanying text.

This Note proposes that the primary focus in considering therapist liability to third parties should not be foreseeability of harm. Rather, in determining whether an emotional distress claim can be brought by a third party, the focus should be on the degree of culpability attached to the therapist's conduct.

B. Intentional Infliction of Emotional Distress: The Proper Standard

It is more consistent with policy considerations to allow such third-party claims only for *intentional* infliction of emotional distress (IIED). The elements of IIED parallel those of NIED, but focus more on the tortfeasor's conduct. The elements of IIED, according to BAJI 12.70, are:

1. The defendant engaged in *outrageous conduct*;
2. [a] The defendant intended to cause plaintiff to suffer emotional distress; *or*
[b] (1) The defendant engaged in the conduct *with reckless disregard of the probability of causing plaintiff to suffer emotional distress*;
(2) The plaintiff was present at the time the outrageous conduct occurred; and
(3) The defendant knew that the plaintiff was present;
3. The plaintiff suffered severe emotional distress; and
4. Such outrageous conduct of defendant was a cause of the emotional distress suffered by the plaintiff.²²¹

The only IIED elements that vary significantly from NIED elements are that the conduct be "outrageous" rather than "negligent," and that the tortfeasor act with "reckless disregard of the probability" of causing plaintiff injury rather than that injury to plaintiff be "foreseeable."

Assuming hypothetically that in the *Ramona* case the therapists' conduct was shocking, liability would properly have been imposed. If the therapists had engaged in "outrageous" conduct,²²² it would not be difficult to conclude that the therapists acted recklessly in disregarding the probability of causing *Ramona* emotional harm.

The *Ramona* case demonstrates why the accused abuser should not be allowed a claim for NIED. The jury acknowledged that the therapists had not acted maliciously; however, they found the therapists' conduct, in practicing commonly used memory-recovery techniques, to be negligent.²²³ Moreover, Holly *Ramona* has made no claim that the therapists acted improperly or negligently and she has

221. BAJI, *supra* note 137, No. 12.70 (emphasis added).

222. See *Bro v. Glaser*, 27 Cal. Rptr. 2d 894, 920 (Ct. App. 1994).

223. *Recalled Memory Verdict Message to Medical Community*, THE LEGAL INTELLIGENCER, May 17, 1994, at 7. The *Ramona* jury did not think the therapists acted maliciously; they found only that the therapists were negligent in that they either implanted or reinforced the false memories of childhood sexual abuse. *Id.*

not recanted her story of abuse. Ramona's former wife and two other daughters, none of whom will speak with Ramona, say this case is just more evidence of Ramona's lifelong pattern of abuse.²²⁴ Nevertheless, the jury awarded Ramona \$ 500,000.²²⁵

It is particularly troubling to impose liability on therapists when so much is still not known about repressed memories. While in some situations "an adult realizes the memories are false and retracts an allegation of childhood abuse[,] [i]n other cases, recalled memories are proven to be fact. Corroborating testimony and medical evidence validate the abuse claims."²²⁶

Conduct that shocks society's conscience, instead of merely negligent conduct, is the appropriate standard for imposing liability on therapists for harm to third parties in recovered-memory cases. First, the therapist's primary duty is to the patient. To compromise the therapist's ability to help the patient would be inconsistent with the policy underlying the privilege protecting the relationship between therapist and patient.²²⁷ Furthermore, when the law has recognized that therapists owe a duty to third parties, that duty has been limited to situations in which an identifiable third party is in serious danger of *physical* rather than emotional injury. Finally, because psychology is an inexact science and the mental health professionals themselves cannot agree on proper therapy techniques, it would be inappropriate to impose liability for performing therapy that is widely accepted within the profession.

The imposition of liability for third parties' emotional distress should be allowed only when the therapists' conduct goes well beyond rational people's notions of reasonableness. At least one California appellate court took this approach, requiring "outrageous" conduct instead of merely "negligent" conduct for a NIED claim by a third-party against a therapist.²²⁸

This standard provides flexibility necessary to protect the injured party's interests *and* the patient's right to benefit from treatment. Liability should be imposed for conduct intended to harm a third party or undertaken in reckless disregard of the possibility of harming a third party. But holding therapists liable for the by-product of well-inten-

224. *Recovered Memory Goes to Trial*, THE LEGAL INTELLIGENCER, *supra* note 215, at 5; see also *Malpractice Case Puts "Recovered Memory" to Test*, THE LEGAL INTELLIGENCER, Mar. 28, 1994, at 6.

225. *Recovered Memory Goes to Trial*, THE LEGAL INTELLIGENCER, *supra* note 215, at 5.

226. Mayo Clinic Health Letter, *supra* note 5, at D6.

227. See *supra* subpart II.A.

228. *Bro v. Glaser*, 22 Cal. Rptr. 2d 894, 920 (Ct. App. 1994) (holding that in order for parents of infant who was physically injured by physician to recover for purely emotional distress, physician's conduct must rise to level of outrageousness.). *Id.*

tioned therapy does not properly address these countervailing interests.

California has extended the general rule far enough by allowing recovery for NIED absent physical injury. Granting direct victim status waters down the principle behind the general rule; allowing accused abusers to maintain that status would dilute the rule to the point of unrecognizability.

Conclusion

Society has a duty to support the victims of childhood sexual abuse, to condemn the perpetrators while upholding the presumption of an accused abuser's innocence, and to allow legal claims to redress legitimate injuries. In addressing "the mental health crisis of the decade,"²²⁹ these countervailing interests must be borne in mind.

In evaluating therapists' duty to their patients, therapists should be required, at a minimum, to "inform the[ir] patient[s] of the risks and hazards [of recovered memory techniques], and of alternative treatments."²³⁰ This is so particularly until repressed-memory theory is either validated or discounted through further research. At the least, therapists should explain the theory behind their techniques, explain any research results, and offer proof of the success they have enjoyed in using these techniques.²³¹

Society can and should expect therapists to adhere to memory recovery techniques that comport with the reasonable practices of others in the profession. However, it should be recognized that psychology is an inexact science,²³² and that both wide support and wide opposition exist for repressed-memory theory. It is therefore difficult to apply rigid standards.²³³ Therapists must be allowed some discretion, and society should not impose liability for honest errors in judgment.²³⁴

In uncovering the mental anguish of a client, a therapist must be extraordinarily careful not to create an environment that fosters false memories. The task is not an easy one. However, the use of tech-

229. See Mayo Clinic Health Letter, *supra* note 5, at D6.

230. Milo Geyelin, *Lawsuits Over False Memory Face Hurdles*, WALL ST. J., May 17, 1994, at B1. Therapists who do not mention the controversy behind the techniques are deceptive and wind up hurting their patients. See Rubiner, *supra* note 81, at T1.

231. According to AM. PSYCHOL. ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 3.03(a)(6) (1992), therapists may not respond to a patient's inquiry about the scientific basis and degree of success of their services with false or deceptive information. This Note would reverse this standard and require that such information be given truthfully even without a patient inquiring into it.

232. See *e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

233. *Id.*

234. Leesfield, *supra* note 140, at 57.

niques that are known to be highly suggestive can only produce suspect results that will not be helpful to clients and will quite possibly cause great harm to them and their families. Although most therapists do not purposefully lead their patients to recover false memories, therapists must be held to high standards of care in the treatment of their patients. For example, perhaps the use of hypnosis and sodium amytal should be severely restricted until further, more conclusive data determines that they are reliable and safe methods of recovering repressed memories.

A problem arises when a therapist owes concurrent duties to both her patient and the alleged abuser; the interests of these two parties may be in direct conflict. Therefore, emotional distress claims by third parties should be allowed only when a therapist's conduct is "outrageous" and intended to cause emotional injury to the third person. Allowing liability for merely negligent conduct in recovering repressed memories of childhood sexual abuse would have a chilling effect on therapists' willingness to help their patients. Therapists would effectively be tied down, unable to try new therapy techniques for fear of inducing false memories, and unable to speak for fear of reinforcing false memories. Recognizing the inexactitude of and the divergent subgroups within the mental health profession, it would be improper to allow redress by third parties who are not a part of the professional relationship, for therapists' use of memory recovery techniques, while the use of such techniques is widely accepted in the profession.

The California Supreme Court should take the next opportunity to clarify its position on "direct victim" status as a component of NIED claims. California should retreat from its broad sanctioning of emotional distress claims. Although society recognizes that many people suffer emotional harm from the negligent actions of others, the law should not "sanction[] claims for hurt feelings."²³⁵ Particularly in repressed-memory cases, and in light of the unique therapist-patient relationship, courts should not allow *Ramona*-type NIED claims.

235. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 825 (Cal. 1980) (Clark, J., dissenting).